IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6479 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DAYARAM LADHA

Versus

CIRCLE OFFICER

Appearance:

1. Special Civil Application No. 6479 of 1992

MR JV DESAI for Petitioners.

MS ARCHANA RAWAL, AGP for Respondents.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 26/02/2004

ORAL JUDGEMENT

This petition is filed under Article 226 of the Constitution of India challenging the notices issued by the Circle Officer, Morbi on 14.09.1992 on the

petitioners for removal of unauthorised encroachment on the Govt. vacant land.

2. It is the case of the petitioners that the petitioners have been carrying on various types of business such as sale of grocery, cutlery, farsan, Pan-Bidies etc. for the last more than 20 to 25 years on the land bearing Survey No. 1415 situated at village Vajepar, Tal. Morbi, Dist. Rajkot. It is further stated that the land on which the petitioners Cabins or Gallas are situated was a Kharaba land and the ownership of that land was of the Govt. of Gujarat. It is further stated that the respondent No.1 i.e. The Circle Officer has issued the notice on 14.09.1992 calling upon the petitioners to remove their Cabins within 2 days from the date of the notice and also directing them to remove the Cabins and if the petitioners would fail to comply with the directions issued in the said notice, the said Cabins, Gallas etc. would be forcibly removed.

3. It is these Notices which are under challenge in the present petition.

4. The Notices are challenged mainly on the ground that the respondent No.1 has acted arbitrarily, capriciously and has not given an opportunity of being heard to petitioners and hence, the said notices are in violation of the principles of natural justice. It was further stated that removal of their cabins forcibly at a short notice of only two days, without providing any alternative site for putting their cabins would deprive them of their right to carry on their business or trade and hence, the said notices are in violation of their fundamental rights contained in Article 19(1)(g) of the Constitution of India. It was further stated that the cabins and/or Gallas are neither situated on highway nor on thorough fare and hence, they are not causing any obstruction to traffic. Hence, petitioners should not be compelled to remove the alleged encroachment within such short period. It was further stated that the Government has not prepared any plan or development of the land on which the petitioners' cabins stand. Hence, there was no imminent need to remove the said cabins and/or Gallas. It is, therefore, stated that the notices are bad in law and violative of principles of natural justice and hence, they deserve to be quashed and set aside.

5. This Court has admitted the petition on 16.09.1992 and interim relief was granted in terms of para 8 (B) of the petition.

6. Ms. Archana Rawal, learned AGP appearing for the respondent has submitted that the petitioners have challenged the impugned notices and by virtue of the interim relief granted by this Court, for the last 12 years, the petitioners have been enjoying the fruits of their unauthorised encroachment on the Govt. land. She has further submitted that the petitioners are not the owners of the land in question and they have made unauthorised encroachment on the Govt. land which cannot be protected looking to the settled legal position. She has further submitted that prior to installation of the Cabins etc., no permission has been received by the petitioners and since the land was required for the purpose of development, such Cabins are causing obstruction and hinderance and hence, they are required to be removed immediately. She has relied on the decision of this Court in the case of ANUPAM REKADI CABIN ASSOCIATION V/S. JAMNAGAR MUNICIPAL CORPORATION, 1995 (1) G.L.H. 586 wherein the provisions contained in Section 23 of the Bombay Provincial Muncipal Corporation Act, 1949 were challenged and the Division Bench of this Court has held that " Under Section 231(a) of the said Act which is sought to be challenged, it is provided that the Commissioner may without notice cause to be removed inter alia any booth or other structure whether fixed or movable which is set up in any street contrary to the provisions of the Act. By clause (c) of S. 231 the Commissioner is authorised to remove any article hawked or exposed for sale in a public place or in any public street in contravention of the provisions of the Act and any vehicle or other thing in which such article is placed. The affidavits filed on behalf of Corporation clearly show that the continuance of the trade by the petitioners in the rekdis / cabins / larri-gallas at the public places in dispute constituted a grave traffic hazard and obstruction to pedestrians who deserve consideration in the matter of their physical safety which cannot be sacrificed in order to accommodate the petitioners and other persons who use public properties for a private purpose unauthorisedly. Empowering the Commissioner to remove the obstructions upon the public streets and other public places cannot be said to be an unreasonable provision. S. 231 of the Act enables the Commissioner, in appropriate cases, to dispense with previous notice to the persons who are likely to be affected by the proposed action. The said provision confers a discretion on the Commissioner to cause an encroachment to be removed with or without notice and such discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a

public act must be fair and reasonable. The power under S. 231 has to be exercised by the Commissioner where the provisions of the Act are contravened. It must be presumed that while vesting in the Commissioner the power to act without notice, the Legislature intended that the powers should be exercised sparingly and in cases of urgency which brook no delay. As observed above, the provisions of S. 231 of the Act confer a discretion on the Commissioner to act with or without notice and it does not intend a command not to issue notice before the removal of an encroachment. In our view therefore, the procedure prescribed under S. 231 of the said Act for removal of encroachment on footpaths or public places over which the public has a right of passage or access cannot be regarded as unreasonable, unfair or unjust. The challenge against constitutionality of the provisions of S. 231 of the said Act made by the petitioners cannot therefore be sustained and the said provision is held to be constitutionally valid. We have taken this view following the reasoning of the Supreme Court for upholding the constitutional validity of a similar provision contained in S. 314 of the Bombay Municipal Corporation Act, 1949 in Olga Tellis V/s. Bombay Municipal Corporation, reported in AIR 1986 S.C. 180."

7. On the basis of the above observations made by the Division Bench, she has submitted that even for the purpose of removal of encroachment of footpaths or public places for which public has a right of passage or excess, even without notice, the Commissioner can act. Here in the present case, notice was issued and pursuant thereto, instead of removing the encroachment, the petitioners have approached this Court. She has, therefore, submitted that the interim stay granted by this Court should be vacated and the petition be dismissed.

8. After having gone through the contents of the petition and after having heard learned AGP appearing for the respondents and after considering the settled legal position, this Court is of the view that the petitioners are not entitled to retain their Larri/Gallas etc. on the Government land since they are not owners of the said land and since they have not obtained any permission from the State Government, putting their Cabins in the said land, they are required to be removed. The Court has taken the view in number of cases that in case of unauthorised encroachment, no protection shall be granted to them. In the above view of the matter, the Court does not find any substance or merits in the petition and hence, the petition is dismissed. Interim relief granted is vacated. Rule discharged without any order as to

costs.

Sd/-

[K.A. PUJ, J.]

#Savariya#

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